

79917-2
NO. 239861

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent

v.

BRENT RICHARD SMITH, Appellant

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

BRIEF OF RESPONDENT

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COUNTER STATEMENT OF FACTS

On November 18, 2004, detectives with the Tri-City Metro Drug Task Force and other officers received information that a stolen vehicle containing anhydrous ammonia was located at a residence at 203212 East SR 397, Kennewick, Benton County, State of Washington. (CP 86).

Detective Gonzales of the Tri-City Metro Drug Task Force had responded to the suspect location in the past, twice for methamphetamine laboratories and once for an incident involving a shotgun. (CP 86). Detective Gonzales had also served a search warrant at the residence in the past, so he was familiar with the layout of the two-story home. (Id.). The officers believed the property, including the residence, to be vacant. (CP 86).

Officers confirmed that the stolen tanker truck was located on the subject property. (CP 86). Multiple law enforcement agencies responded to the location, including the fire department.

(Id.). Officers were concerned about the possibility of a leak of anhydrous ammonia.

(Id.). Law enforcement had received information that there may have been as much as 1,000 gallons of anhydrous ammonia in the tank of the vehicle.

(CP 86).

The initial entry onto the property was made without a warrant. (CP 87). Entry was made by two officers of the Tri-City Metro Drug Task Force who wore protective gear and approached the vehicle to make sure there were no leaks. (CP 87). Detective Gonzales confirmed that the two tanks, which contained approximately 1,000 gallons of anhydrous ammonia, were not leaking. (CP 87). Based on his training, experience, and the information gathered from the Federal Bureau of Investigations concerning the dangers associated with small amounts of anhydrous ammonia, Detective Gonzales was concerned about the safety of individuals on the subject

property, as well as those located on surrounding properties. (CP 87).

While two officers examined the tanker truck, several other law enforcement officers surrounded and contained the residence on the property. (CP 87). No entry into the home was made at that time. (Id.). Officers knocked and announced their presence at the residence, but received no response. (Id.).

While containing the residence, Detective Brockman saw through the window what appeared to be a rifle. (CP 87). The apparent rifle was located in the living room area of the first floor next to a mattress. (Id.).

Outside the residence, between the residence and the vehicle, officers found a propane tank with a modified and discolored valve, which Detective Gonzalez recognized by training and experience to be consistent with the storage of anhydrous ammonia. (CP 88).

Approximately ten minutes after the initial knock and announce, Brent Richard Smith and Kimberly Yvonne Breuer exited the residence with a white dog. (CP 88). Smith and Breuer were both handcuffed and detained. (Id.).

The defendant, Brent Smith, told officers that he had found the residence open and had been staying there for several days. (CP 88). Smith also stated that he was aware of the presence of the truck, but that he had no knowledge as to its contents. (Id.). When the front door was open, officers observed that the gun was no longer present in the living room. (CP 88; Suppress Hr'g RP at 23).

At the suppression hearing held on January 21, 2005, Detective Gonzalez testified that he was concerned about the possibility of an individual with a weapon inside the residence. (Suppress Hr'g RP at 29, 35; CP 88). Not only did officers face the threat of being shot, but there was also a risk that one of the pressurized tanks

containing anhydrous ammonia could be punctured. (Id.). Detective Gonzales testified that he was aware that anhydrous ammonia can cause severe chemical burns in small amounts. (CP 88-89; Suppress Hr'g RP at 29).

Officers entered the residence without a warrant to do a safety sweep for additional individuals and to locate the gun. (CP 89). The only areas searched were those places where a person could hide. (Suppress Hr'g RP at 25). During the safety sweep, officers located a 16-gauge shotgun in an upstairs crawlspace. (CP 89). Also during the safety sweep, law enforcement observed several items consistent with the manufacture of methamphetamine. (Id.). This information was included in a subsequent application for a warrant. (CP 89). The warrant was granted, and a search of the residence uncovered a methamphetamine laboratory. (CP 89).

On November 23, 2004, the defendant was charged by Information with one count of

Manufacture of a Controlled Substance, to wit: Methamphetamine. (CP 79-80). Defense counsel filed a motion to suppress evidence pursuant to CrR 3.6, and the motion was heard before the Honorable Judge Cameron Mitchell on January 21, 2005. (Suppress Hr'g RP at 7). After testimony from the State and argument from counsel, Judge Mitchell denied the defendant's motion to suppress, finding that the emergency exception to the warrant requirement justified the protective sweep of the residence made by law enforcement. (Suppress Hr'g RP at 42-44).

The matter proceeded to jury trial, and the defendant was found guilty on February 18, 2005 of one count of Manufacture of a Controlled Substance, to wit: Methamphetamine. (Trial RP at 247). This timely appeal followed.

ARGUMENT

Defendant's counsel argues the trial court erred in denying the defendant's motion to suppress under CrR 3.6. The State contends that the trial court acted within its discretion in denying the motion.

a. Denial of the Defendant's motion to suppress was proper because the State established the emergency exception to the warrant requirement.

A trial court's denial of a suppression motion is reviewed to determine whether substantial evidence supports the trial court's challenged findings of fact. State v. Dempsey, 88 Wn. App. 918, 921, 947 P.2d 265 (1997). If substantial evidence exists, the question is then whether the findings support the conclusions of law. Id. Substantial evidence exists when there is a sufficient quantity of evidence to persuade a fair-minded, rational person of the truth of the finding. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

The court will review only those findings of fact to which error has been assigned; unchallenged findings are treated as verities on appeal. Hill, 123 Wn.2d at 644, 647. The defendant has not assigned error to any of the CrR 3.6 findings of fact. (Ap. Br. at 1). Conclusions of law are reviewed de novo. State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 772 (1999).

When the State acts without a warrant, it bears the burden of establishing that the search undertaken was reasonable. State v. Hopkins, 113 Wn. App. 954, 958, 55 P.3d 691, 693 (Div. III, 2002). Although warrantless searches are per se unreasonable, an emergency situation can justify such a search. State v. Downey, 53 Wn. App. 543, 544, 768 P.2d 502, 503 (Div. I, 1989). Thus, when premises contain persons in imminent danger of death or harm; objects likely to burn, explode, or cause harm, or information that will disclose the location of a threatened victim or the existence of such a threat, police may search

those premises without first obtaining a warrant.

Id.

To meet the burden of establishing the emergency exception to the warrant requirement, the State must demonstrate that the warrantless actions taken were not pretextual. In other words, the search must actually have been motivated by a perceived need to render aid or assistance. State v. Loewen, 97 Wn.2d 562, 568, 647 P.2d 489 (1982). To do this, the State must prove that: (1) the searching officer subjectively believed an emergency existed; and (2) a reasonable person in the same circumstances would have thought an emergency existed. Loewen, 97 Wn.2d at 568, 647 P.2d 489; State v. McAlpin, 36 Wn. App. 707, 677 P.2d 185 (1984) (applying emergency exception to justify warrantless search for a gun). In determining whether the first of these conditions is satisfied, the court may examine whether the officer's actions were

consistent with his or her claimed motivation.
Downey, 53 Wn. App. at 545, 768 P.2d at 503.

In the case at bar, the law enforcement officers who responded to 203212 East SR 397 initially believed they had contained an abandoned, vacant residence. This belief was ultimately dispelled when Detective Brockman observed a rifle through the partially boarded window, and when two unexpected individuals exited the home approximately ten minutes after officers knocked and announced their presence. When the front door swung open and the defendant came out with Kimberly Breuer, law enforcement looked inside and realized that the rifle was no longer located by the mattress. Given the fact that the gun was missing, and that the officers were surprised by the presence of the defendant and Ms. Breuer in the otherwise-abandoned home, it was both subjectively and objectively reasonable for law enforcement to fear that someone else was potentially in the house with

the weapon. Not only were the officers at risk of being shot, but an ill-fated bullet would have jeopardized everyone's safety in the event it punctured the 2,000 gallon tanker truck filled with anhydrous ammonia.

The actions of law enforcement during the protective sweep of the residence were consistent with their claimed motivation, and further substantiate the officers' subjective belief that an emergency situation existed. The only areas searched were those areas in which dangerous persons could be hiding. Further, no objects were seized aside from the 16-gauge shotgun located in the crawlspace.

In his motion to suppress, Defendant relied exclusively on State v. Hopkins as the controlling legal authority. Although Hopkins addresses the concept of a "protective sweep," the case is distinguishable from this case in a number of ways. First, the protective sweep in Hopkins was performed incident to a valid arrest

warrant, and occurred after the wanted suspect was taken into custody. Hopkins, 113 Wn. App. at 960, 55 P.3d at 694. Further, the officers in Hopkins failed to articulate facts to support a reasonable belief that dangerous persons were in the searched outbuildings. Id.

In the case at bar, the search was not conducted incident to an arrest warrant since law enforcement were not on the property to arrest a suspect. Instead, law enforcement responded to 203212 East SR 397 to secure a stolen 2,000 gallon tanker truck filled with 1,000 gallons of anhydrous ammonia. Further, the presence of a gun which suddenly went missing, coupled with the unexpected exit of the defendant and Ms. Breuer in an otherwise-abandoned residence, were facts sufficient to support a reasonable belief that additional persons may be located in the home, and that they may be armed. Hopkins is inapposite, and does not control.

Law enforcement lawfully entered the property located at 203212 East SR 397 to secure the stolen tanker. The defendant's argument, by negative implication, is that the officers had one of two options; retreat from the premises and leave the stolen tanker containing 1,000 gallons of anhydrous ammonia unsecured, or take the risk that another unforeseen individual in the residence would use the weapon to fire upon them while they waited on a warrant, possibly causing injury or death to an officer, or a chemical catastrophe by puncturing the tanker.

Because law enforcement had both a subjective and objectively reasonable fear that one or more dangerous persons could have been in the residence with the missing rifle, the emergency exception to the warrant requirement justified the protective sweep performed by officers to secure their safety. Defendant's motion to suppress was properly denied.

CONCLUSION

The protective sweep was valid because the State established the emergency exception to the warrant requirement. Therefore, the trial court's denial of the defendant's motion to suppress was proper. The State respectfully requests that this Court affirm the defendant's conviction for manufacture of a controlled substance.

Dated this 24th day of July, 2006.

Respectfully Submitted,

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